LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 1316

TED BUSHMAN,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the County of Santa Barbara, State of California.

JOHN M. SINK,
Lawyer for Petitioner,
8 East Figueroa Street,
Suite 200,
Santa Barbara, Calif. 93104.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3
Statement	5
Reasons for Granting the Writ	11
Conclusion	14

INDEX TO APPENDICES

Appendix A. Judgment of Municipal Court	1
Appendix B. Opinion of Appellate Department of Superior Court	8
Appendix D. Denial of Application for Transfer	19
Appendix D. Jury Instruction (Refused)	20

TABLE OF AUTHORITIES CITED

Cases	Page
Barber v. Page, 390 U.S. 719	13
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81	12
Brown v. Louisiana, 383 U.S. 131	12
Bruton v. United States, 391 U.S. 123	13
Chapman v. California, 386 U.S. 18	13
Cox v. Louisiana, 379 U.S. 559	12
Douglas v. Alabama, 380 U.S. 415	13
Giannini and Iser, In re, 69 Adv. Cal. 588	13
Gregory v. City of Chicago (October Term 1968, No. 60, decided March 10, 1969)	12
Kinoy v. District of Columbia, 400 F. 2d 761	12
New York Times Co. v. Sullivan, 376 U.S. 254	12
People v. Allenthrop, 64 Cal. 2d 679, 51 Cal. Rptr. 244, 414 P. 2d 372	2
People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P. 2d 111	13
Pickering v. Board of Education, 391 U.S. 563	12
Pointer v. Texas, 380 U.S. 400	13
Rosenblatt v. Baer, 383 U.S. 75	12
St. Amant v. Thompson, 390 U.S. 727	12
Talley v. California, 362 U.S. 60	2
Whittaker v. Superior Court, 68 Cal. 2d 357, 66 Cal. Rptr. 710, 438 P. 2d 358	2

Rules

California Rules of Court, Rule 62	2
California Rules of Court, Rule 63	2
California Rules of Court, Rule 976	2

Statutes

	Page
California Constitution, Art. 6, Sec. 13	4, 13
California Penal Code, Sec. 415	1, 5
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, First Amendment	3, 10, 12, 13
United States Constitution, Sixth Amendment	3, 4, 10, 11, 13
United States Constitution, Fourteenth Amendment, Sec. 1	4

Textbook

Paul Chevigny, Police Power (1969), pp. 24-26	12

IN THE

Supreme Court of the United States

October Term, 1968
No. .....

TED BUSHMAN,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the County of Santa Barbara, State of California.

Petitioner asks certiorari to review a judgment of the Appellate Department of the Superior Court of the State of California for Santa Barbara County.

Opinions Below.

Petitioner was convicted after a jury trial in the Santa Maria Municipal Court of violating California Penal Code Section 415 (maliciously disturbing the peace); a copy of the Municipal Court's judgment is attached as Appendix A. The Appellate Department of the Superior Court of the State of California for the County of Santa Barbara affirmed this conviction by an opinion dated and filed December 17, 1968; a copy of the opinion (the judgment of which review by certiorari is now sought) is attached as Appendix B. A copy of the opinion of the Appellate Department of the Su-

perior Court denying transfer of this case of the Court of Appeal, dated and filed January 13, 1969, is attached as Appendix C. These opinions are unpublished under California Rules of Court, Rule 976 [60 Cal. 2d 1-2 (1964), amended 65 Cal. 2d 12 (1966)]. No other opinion is involved. The opinion of the Appellate Department of the Santa Barbara Superior Court is therefore a final judgment rendered by the highest State court in which a decision can be had in this case, under California Rules of Court, Rules 62 and 63 [57 Cal. 2d 9-12 (1962)]. *Talley v. California,* 362 U.S. 60, 62 (1960); *Whittaker v. Superior Court,* 68 Cal. 2d 357, 365, 66 Cal. Rptr. 710, 438 P. 2d 358, 365 (1968); *People v. Allenthorp,* 64 Cal. 2d 679, 682-683, 51 Cal. Rptr. 244, 247, 414 P. 2d 372, 375 (1966).

Jurisdiction.

The opinion sought to be reviewed by this petition (Appendix B) was dated and entered December 17, 1968.* There was no order respecting a rehearing. By an application filed in this Court on March 17, 1969, petitioner obtained an order dated March 19, 1969 extending the time for filing this petition for writ of certiorari to and including April 26, 1969. Jurisdiction to review this judgment by writ of certiorari is derived from 28 *U.S.C.* Sec. 1257(3).

---

*This date (December 17, 1968) is the date of the judgment [App. Dept. CT 15] and also the date which the Clerk's Office advised us (by telephone) that the judgment was filed and entered. Local practice is to file and enter judgments on their dates. However, we note from the transcript [App. Dept. CT 6, 15] that this judgment bears stamps showing it was filed later, on December 23, 1968, and not entered until January 24, 1969. Although these later dates would have helped our own filing, by making our extension less urgent, we have chosen to use the earliest date (December 17, 1968) from excess of caution.

Questions Presented.

1. Where a lawyer appearing before a legislative board communicates an idea critical of the board's official acts, by means of a wordless action not in itself offensive but which conveys a meaning derived from prior dealings that so infuriates the chairman that he instantly assaults the lawyer, and then prosecutes the lawyer for maliciously disturbing the peace, is the unresisting (speechless) lawyer entitled to a jury instruction as to the circumstances under which his act might be protected by the First Amendment?

2. Where the lawyer testified that he acted not from malice but to persuade the board of the existence of certain facts, and the lawyer was then impeached as to his reason for acting solely by a witness who did not appear at the trial but whose testimony was introduced in the form of a letter, and where the appellate court agreed that the introduction of the letter violated his right to be confronted by witnesses against him under the Sixth Amendment, may his conviction be affirmed nonetheless under a state doctrine of "harmless error"?

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes which this case involves are:

UNITED STATES CONSTITUTION, FIRST AMENDMENT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION, Art. 6, Sec. 13.

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the

court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CALIFORNIA PENAL CODE Sec. 415.

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court.

Statement.

Petitioner is a lawyer practicing in Santa Maria, California. At the time of this incident (July 6, 1967), he had been a pilot for about seven years [RT 156:5-8]. His practice included aviation clients and required him to appear regularly before the board of directors of the Santa Maria Public Airport District. None of the members of the board was then an active pilot [RT 160:5-9]; petitioner was not a member then [RT 93:5-7] but has since been elected to that board.

For over a year before this incident, petitioner had been concerned about the condition of the runways at the Santa Maria Public Airport. As a consequence of what petitioner considered long-standing neglect, these runways were cracked, pitted, beginning to grow weeds and were filthy, littered with gravel, metal, glass and debris [RT 158:1-9]. During the year preceding July 6, 1967, petitioner and other persons expressed their concern to the board, particularly about the gravel. During this time, there was no correction or improvement of the runways [RT 158:10-20]. The board was aware of petitioner's feelings about the runways, but disagreed [RT 133:18-24]. Apparently the disagreement was that the board did not believe that there was antyhing wrong with the runways, gravel or otherwise; in any event, the board continued to ignore petitioner throughout these months [RT 169:7-8].

Matters finally reached a deadlock. Petitioner was unable to persuade the board to believe (or acknowledge) that the gravel existed. He also came to believe that his own persistence had made him unpopular with individual members of the board, and that his repeated contentions about the gravel, or some other part of his personality, had made him sufficiently unwelcome that his very appearance before the board provoked resentment, apart from any words he had to say [RT 196:15 to 197:26; also RT 208:20-26].

On the late afternoon of July 5, 1967, the day before a regular board meeting at which petitioner was scheduled to appear again on behalf of his clients, he went to the Santa Maria Public Airport and walked out on the runway, equipped with broom, dustpan and bucket [RT 161:20 to 162:6]. He made five parallel sweeps

across the width of the main runway, collecting a random sample of the gravel about which he and his clients had been complaining so long [RT 160:10-14]. Petitioner was acutely anxious to convince the board that the gravel was there and was dangerous; he had been told that week of damage to an aircraft caused by the gravel on this particular runway and he feared a major catastrophe [RT 160:23-26; 169:7-10; 171:14-17].

The pile of gravel which petitioner collected was enough to fill his bucket within two or three inches from the top [RT 162:20-25]. It had been there several years and had accumulated a little dirt [RT 137:8-14; 97:5]. This sample also included some metal scraps, and a sharp sliver of metal, which happened to be within the five broom-width sweep [RT 151:2-7; 172:19 to 173:11].

While petitioner was on the runway he was observed by a member of the airport staff [RT 194:14 to 195:1] who informed Prentice, the chairman of the board, that appellant had been on the runway and had collected a bucket of gravel. Prentice was therefore aware at the beginning of the next regular board meeting (the following morning, July 6, 1967) [RT 127:4-25], where petitioner was scheduled to appear and had matters on the agenda for his clients [RT 108:4-10], that petitioner had a bucket of runway gravel.

The board meeting took place as usual in a small room on the second floor of the Pacific Airlines terminal building at the Santa Maria Public Airport [RT 116:11-24]. There was room for two rows of folding seats for the public [RT 147:19 to 148:4]. The atmosphere was informal. Smoking was allowed [RT 121:11-14] and the board's coffee machine freely used

during board meetings [RT 121:15-19; 122:4-16; 104: 7-8]. Airport board meetings were subject to regular interruption by noise, since one wall of the meeting room was an outside wall of the building, on the runway side [RT 120:20-25]. The racket of commercial jets would bring things to a halt; but as a rule, smaller aircraft were not noisy enough [RT 121:20-26].

Petitioner brought his bucket of gravel to this meeting and placed the contents on the tabletop in front of Prentice. He said nothing at all while doing this [97: 2-4; 138:25 to 139:4]. There was a rattling sound as the gravel came in contact with the table.

This gesture showed no effect on the few members of the public present, except that one woman commented, "Isn't that stupid" [RT 114:18]. The effect on Prentice, however, was electric [RT 136:22-24]. He sprang up, called petitioner a "dirty low-down son of a bitch", lunged and made every effort to fight with him [RT 96:24 to 97:25]. Petitioner said nothing and withdrew from the room immediately; other persons restrained Prentice [RT 97:25 to 98:7]. When petitioner was gone, Prentice immediately demanded the services of a photographer, ordered that nothing be moved [RT 114:20-21; 130:14-18], recessed the meeting [RT 98: 8-13]; someone called the police, and had statements taken by a court reporter [RT 100:15-16; 107:10-15]. Prentice had not received any physical injury; a little dust had gotten in his lap, and some was later found and photographed on a portion of his chair [RT 102: 9-13]. He felt, however, that he had received some mental hurt [RT 137:5-7]. He did not discuss the matter with petitioner, although the latter had returned with his brief case within ten minutes after placing

the gravel on the table, and had sat quietly in the back of the room [106:14-22]. Instead, Prentice filed the criminal complaint which resulted in this prosecution.

Petitioner asked for a jury instruction (Appendix D) to the effect that free speech may serve its purpose by inducing unrest, dissatisfaction with conditions, or even anger, so that petitioner could not be convicted merely because the board of directors had been disturbed or angered, but only if petitioner's action was indeed offensive and malicious. This instruction was refused [CT 54, 56].

The main issue for the jury was raised by petitioner's testimony that he brought the gravel into the hearing room not maliciously, but to persuade the board that there was loose gravel on the runway [RT 157:12 to 161:4; 164:9 to 169:10, 171:2-17; 195:18-26]. The prosecutor argued that it was not done to persuade the board of anything, but as a "cheap publicity stunt", and that in fact there had not been any gravel on the runway. To do this, the prosecutor placed in evidence (over objection) a letter [People's Ex. 8] from the F.A.A. to petitioner, dated January 23, 1968, written five months *after* the gravel incident. This letter said that petitioner had complained about the gravel to the F.A.A. (also *after* the incident of July 6, 1967) and that in doing so, petitioner had quoted an article which he had written himself concerning this gravel; that the F.A.A. had not verified the gravel. Petitioner objected on the ground of hearsay, that the events of the letter were subsequent to those in the trial, and that the letter was a device to get testimony before the jury by a person not subject to cross-examination [RT 203:1-26], and that petitioner was being denied the right to confront a hostile witness

(the writer of the letter). The court admitted the letter over those objections [RT 204:10; 208:2-3], and the prosecutor used it in his final argument to suggest to the jury that petitioner had been lying to the F.A.A., and consequently must be lying to the jury ("trying to fool you") [260:4 to 262:2; 279:5-25].

After a verdict of guilty, the trial judge wrote a seven-page opinion (Appendix A), including this comment on the significance of the letter:

> During the trial, other instances of Mr. Bushman's unreliability and untruthfulness, deception and misconduct, came to light. I refer to the letters placed in evidence, correspondence between Mr. Bushman and the Federal Aviation Administration concerning his vociferous complaints about the presence of gravel on the airport runways. Mr. Bushman knowingly and intentionally, gave unfounded and unverified information to the F.A.A. with the obvious intention that his misleading information be acted upon by the F.A.A.

Petitioner appealed to the Appellate Department of the Superior Court on the ground that the prosecution infringed his First Amendment rights to free speech and that he had been entitled to appropriate jury instructions; also, that he was denied the right of confrontation under the Sixth Amendment. The Appellate Department (Appendix B) rejected the first argument on the ground that no speaking was involved [App. p. 15]:

> From the time appellant entered the room until he left it he said nothing. Nor can any sensible argument be made that appellant's acts amounted to some sort of symbolic speech, protected by the First Amendment.

Although the Appellate Department agreed entirely that the letter had been improperly received and violated petitioner's Sixth Amendment right to confront the letter writer, and that the burden of proof was on the People to show this federal constitutional error had been harmless beyond a reasonable doubt, nevertheless, this error was harmless. The Appellate Department reached this conclusion because, although it recognized that petitioner had denied any intention of annoying the board, he also admitted that he knew matters had reached the explosive point so that petitioner's presence in the board room, alone, annoyed the board members. As the Appellate Department saw it, petitioner's willingness to bring the gravel in under those circumstances, with the intention of placing it in front of the president of the board, was a disturbance of the peace entitled to no protection whatever [App. pp. 12-15].

Reasons for Granting Writ.

This writ should be granted because of two reasons that touch many other people besides petitioner. First, he is being punished for an act which consisted largely, if not entirely, of a communication from a lawyer to a legislative body. The board of directors was responsible for maintaining a public airport and its runways. Petitioner was a lawyer who had argued repeatedly for himself and clients that the runways were littered with gravel and unsafe. Petitioner used no words, because as everyone conceded, words were useless. He did not throw gravel at the board, he put it on the table. It was not just any gravel, but gravel from the runway, as the chairman actually knew. And so to those particular legislators, at that time and place, the gravel

was not a weapon or a little pile of missiles, but something more effective. It was a message. It meant Bushman was saying that he was right and they were wrong; that was too much, and that was why the outburst occurred. This Court has previously recognized limited First Amendment protection for criticism of public officials on a non-face-to-face basis. *Pickering v. Board of Education,* 391 U.S. 563 (1968); *St. Amant v. Thompson,* 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967); *Rosenblatt v. Baer,* 383 U.S. 75 (1966); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Similarly, this Court has not been reluctant to find First Amendment protection for communications which take the form of symbolic acts. *Gregory v. City of Chicago,* (October Term 1968, No. 60, decided March 10, 1969); *Brown v. Louisiana,* 383 U.S. 131 (1966); *Cox v. Louisiana,* 379 U.S. 559 (1965). It would be constitutionally inappropriate if criticism of public officials, that enjoys limited protection when carried on in the public press, should be utterly deprived of First Amendment protection when done face-to-face, in the form of a symbolic act, in a legislative hearing and by a lawyer in the course of his practice. Situations reminiscent of *Kinoy v. District of Columbia,* 400 F. 2d 761 (D.C. Cir. 1968) should not be decided on the chance outcome of technicalities, such as the precise wording of a misdemeanor charge. People framing misdemeanor charges for repressive purposes are quick to learn which charges to frame. *See, e.g.,* Paul Chevigny, *Police Power* at 24-26 (1969). It would be ironic if a lawyer's symbolically-imparted criticism of a legislative body received less constitutional protection than, to name a recent ex-

ample, the symbolically-imparted message of a bare-breasted dancer. See *In re Giannini and Iser,* 69 Adv. Cal. 588 (1968). All that we request is a thin net of constitutional cover in the form of a jury instruction which protects the first Amendment element of what petitioner did.

The second reason the writ should be granted is that the Appellate Department's idea of what is tolerable in the form of contitutional error flies in the face of rulings of this Court (and those of other California courts). There is no question that the Sixth Amendment applies to California. *Bruton v. United States,* 391 U.S. 123 (1968); *Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). These are acknowledged in *People v. Johnson,* 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P. 2d 111 (1968). It is generally understood that despite California Constitution Art. 6, Sec. 13, concerning harmless error, the standard for an error of constitutional dimensions is that of *Chapman v. California,* 386 U.S. 18 (1967). The appellate department effectively wiped out all of those cases in a way which could be resorted to by any court so minded: it simply said that although petitioner testified to facts (about his own state of mind) that would have justified his acquittal, and was impeached on those facts solely by a witness he did not confront, still, petitioner said other things which (the court decided) should be construed as sufficient to uphold his conviction. If judicial construing in favor of affirmance were allowed to inform the Bill of Rights, then the long dead doctrine of Nullification would be with us again, and John Calhoun would have won out at last.

Conclusion.

For each and all of the foregoing reasons, this writ of certiorari should be granted, and the judgment of the Appellate Department of the Santa Barbara Superior Court should be reversed.

Respectfully submitted,

JOHN M. SINK,
Lawyer for Petitioner.

APPENDIX A.

Judgment.

Municipal Court of the Santa Maria Judicial District, County of Santa Barbara, State of California.

The People of the State of California, Plaintiff, vs. Ted Bushman, Defendant. No. M-3869.

The defendant was charged with, and convicted of, a violation of Penal Code Section 415—disturbing the peace, which is a misdemeanor punishable by a fine of not to exceed $200.00, or by imprisonment in the county jail not to exceed 90 days, or by both fine and imprisonment, or by either fine or imprisonment, in the discretion of the Court. The defendant was found guilty, beyond a reasonable doubt, by a jury, after a two day trial. Counsel for the prosecution and for the defense both presented their positions in an outstanding manner, as I stated to them at the conclusion of the trial. Time for pronouncement of judgment was set for this date and time—May 28, 1968 at 1:30 P.M.

I have soberly considered the case and have endeavored to reach a judgment that will be reasonable, fair to the defendant, and yet enforce the law as it should be enforced.

Today, we are in deep trouble as a people. No society can live in constant tumult. We will have either a civil order in which discipline is internalized in the breast of each free and responsible citizen, or sooner or later we will have repressive measures designed to re-establish order. The anarchist plays into the hands of the authoritarian. (Former HEW Secretary John W. Gardner)

We are not concerned in this case with the right of free speech—we are concerned with a disregard for law and the rights of others. "Freedom of speech can never harm us—if we remember that freedom of speech is a two-way street. We must guard every man's right to speak; but we must defend every man's right to answer." (President Johnson—1967)

The over-riding danger in the United States today is not that the rights of dissidents will be suffocated, but that their rampant and heedless abuse by those recklessly acting to deny these rights to others will undermine the concept and climate of freedom of speech and freedom of assembly for everybody. If we are going to preserve the whole range of Civil Rights, we must reject the whole range of Civil Wrongs.

When a college student stands up at a public meeting and hurls a pie into the face of a speaker whom other students wanted to hear, he isn't just staining the clothes of an invited guest, he is smearing the Bill of Rights. What does the conduct of such a student and what does the conduct of the defendant Bushman mean? Are these actions just passing exuberances, college pranks? Far from it. They are rebellion against civil order tearing apart our democratic society. Ponder these words from Erwin N. Griswold, Solicitor General of the United States, and former dean of Harvard Law School: "Violent opposition to law—any law—or forcible disregard of another's freedom to disagree falls beyond the pale of legitimate dissent or even of civil disobedience, properly understood; it is nothing short of rebellion."

The Supreme Court has said "No mob has ever protected any liberty, even its own". Civil government

cannot let any group ride roughshod over others simply because their "Consciences" tell them to do so. The Vice-president has put it this way: "Fascists, communists, racists, cross-burners, book-burners, flag-burners—all of them share a basic intolerance for the views of others and for the rights of others".

Communism and fascism enthrone the premise that the end justifies the means. The antifree-speech harassment and violent disdain of the rights of others at loose in the land today is the stuff from which communism and fascism are made.

And what do these principles have to do with the defendant in this case? The defendant stands convicted of being a publicity seeker, whose sole purpose in disrupting the meeting of the board of directors of the Santa Maria Airport District on July 6, 1967 was to call attention to himself. And this was at a time when the defendant was seeking the office of director himself, to which I hasten to add he was unfortunately elected. With his callous display of bad manners, arrogant rudeness, and childish behavior, he is inviting those who may disagree with him to disrupt the meetings of the board of which he is now a member. He has set the example for similar misconduct by persons as foolish and smart-aleck as he has shown himself to be.

However, the defendant's conduct was more than a hasty, impulsive act. His conduct was premeditated—as he gathered the gravel and dirt from the airport runway the evening before. And when Ted Bushman dumped the gravel on the desk of Donald Prentice, he not only created a disgusting scene—he added a stain to the Bill of Rights. His conduct was a disgrace to the legal profession of which he is a member. I am certain

that every conscientious and ethical attorney in this County, and elsewhere, who are aware of the facts suffered more than a little embarrassment and shame because of the conduct of a fellow lawyer. A fellow lawyer whose position is that of an officer of the Court—who should be the first to demand respect for law and order, not the first to tear down the standards of social behavior and obedience to the law of our land.

I commended the jury for their penetration and discernment. They were not deceived by Mr. Bushman's assertion that his dumping of the gravel was an accident —they were not fooled by his claim that he was only demonstrating the right to disagree with the Establishment. They recognized this conduct for what it was—a vulgar, rude, annoying, and aggravated breach of the peace.

The jury did not believe the testimony of Mr. Bushman that the dumping of the gravel was an accident. Neither did I place the slightest credence on his testimony to that effect. I am quite sure that the jury must have come to the same conclusion that I did—that Mr. Bushman is not a person whose testimony under oath can be believed—that Mr. Bushman committed perjury in this courtroom. This is a sad commentary on the alleged principles of Mr. Bushman—who holds himself out as a battler for the under-dog—who will fight for his principles at all costs.

Mr. Bushman demonstrated that he did not learn anything from the charge filed against him, and it appears to me that he has not gained any knowledge, insight or judgment because he has been convicted. I read an article which appeared in the Santa Barbara News Press on Wednesday evening, May 22, 1968, the same

day Mr. Bushman was convicted. The article quoted an attack by Mr. Bushman on another community leader and Mr. Bushman referred to the conduct of the victim of his attack as "it must be termed, most charitably, a stupid, vicious and injudicious personal attack". It is almost incredible that Mr. Bushman has the gall to attack another person and accuse him of a "stupid, vicious and injudicious personal attack". How apt his own terms are when used to describe Mr. Bushman's own conduct at the airport directors' meeting!

The defendant has displayed not the slightest remorse for his inexcusable behavior. No regrets have been expressed, unless one can believe that Mr. Bushman's explanation of the dumping of the gravel as being an "accident" can be construed as expressing an apology. I do not construe it as such. It was obvious that, in making this alleged explanation, Mr. Bushman was only trying to avoid the consequences of his own act and he was willing to commit perjury to do it.

During the trial, other instances of Mr. Bushman's unreliability and untruthfulness, deception and misconduct, came to light. I refer to the letters placed in evidence, correspondence between Mr. Bushman and the Federal Aviation Administration concerning his vociferous complaints about the presence of gravel on the airport runways. Mr. Bushman knowingly and intentionally, gave unfounded and unverified information to the F.A.A. with the obvious intention that his misleading information be acted upon by the F.A.A.

It is revealing to note that, in spite of the defendant's publicized battles against injustice, against the Establishment, or whatever he thought he was fighting for, his alleged principles became non-existent when he

was facing punishment for a criminal offense. Did the defendant stand up and admit that he had deliberately and intentionally dumped the gravel on the desk of Mr. Prentice? Not this defendant. He claimed, belatedly, that it was an accident. He did not dispute the testimony of other witnesses that he had never claimed that the incident was an accident when he was basking in the light of self-arranged publicity after demonstrating his "smart-aleck" behavior. Did he stand up, as a courageous man of principle, and admit that he had deliberately dumped the gravel in order to call attention to his battle for truth and for justice? Not this defendant.

What is to be done with Mr. Ted Bushman?

A fine of $200.00 and a jail sentence of 90 days might serve to improve his behavior, but it would deprive him of his livelihood and be a hardship on his wife and children. I am inclined to grant him probation, although I doubt very much that anyone can change his attitude unless he makes the effort himself.

The defendant is sentenced to 90 days in the County Jail and to pay a fine of $200.00. The sentence and the fine are suspended for two years and the defendant is placed on probation, under the supervision of the County Probation Department. In addition to the usual terms and conditions of probation, the following specific conditions are imposed:

1. The defendant will promptly and sincerely make a public apology to Donald Prentice and other members of the Airport District Board of Directors, and staff, as they existed on July 6, 1967.

2. Defendant will reimburse the Airport District in the sum of $100.00, payable within 10 days, as par-

tial payment for costs of cleaning the director's room after the incident on July 6, 1967, expense of employment of photographers, and loss of time.

3. Defendant will seek psychiatric treatment, at his own expense, with a qualified psychiatrist, approved by the Court, and will continue such treatment for such period of time and at such intervals as may be suggested by the doctor, and approved by the probation department and the Court.

4. Defendant will tender his resignation to the Board of Directors of the Santa Maria Public Airport District, and the matter of acceptance of such resignation will be up to the discretion of the board. The defendant will seek no other public office during the period of probation, and will refrain from engaging in any publicity seeking activities, including radio, television and newspapers. The defendant will request a consultation with the Santa Barbara Bar Association, Lompoc-Santa Maria Chapter, to discuss his conduct mentioned in this opinion, with the view that defendant will hereafter comply with all recommendations of the Bar Association designed to insure that defendant conducts his business and affairs in an ethical and professional manner, avoiding violation of the Rules of Professional Conduct of members of the Bar.

Dated: May 28, 1968.

Arden T. Jensen
Judge

APPENDIX B.

Memorandum of Opinion and Decision.

In the Appellate Department of the Superior Court of the State of California in and for the County of Santa Barbara.

The People of the State of California, Plaintiff and Respondent, vs. Ted Bushman, Defendant and Appellant. No 82816.

Appeal from a judgment and order of the Municipal Court of the Santa Maria Judicial District, Arden T. Jensen, Judge assigned. Modified and affirmed.

Appearances:

For Appellant: John M. Sink.

For Respondent: David D. Minier, District Attorney, by JAMES P. FAHRES, Deputy District Attorney.

The defendant and appellant in this case was charged with and convicted of a violation of Penal Code Section 415, disturbing the peace, after a jury trial. This appeal is from the judgment and from the order granting probation.

The reporter's transcript of the trial proceedings discloses ample evidence to support the conviction, and no attack is made upon the sufficiency of the evidence in this regard.

Appellant's first point is that the receipt in evidence of a letter from the Federal Aviation Agency, dated January 23, 1968, constituted reversible error, being hearsay. The disturbing the peace charge of which appellant was convicted occurred on July 6, 1967. Essentially, the evidence relied upon by the People to support the charge was that appellant on that date entered a

room where the Board of Directors of the Santa Maria Airport District were conducting a regularly scheduled public meeting, and deliberately dumped a bucket of gravel, dirt, and debris on the table in front of the President of the Board, spilling the contents generally over the table, burying various papers that were on the table, and spilling a part of the contents onto the floor and into the lap of the President. A difference of opinion had theretofore existed between appellant and the Board over runway conditions at the airport. Appellant had complained to the Board that the runway was dangerous to aircraft because of the accumulation of loose gravel and scraps of metal. It was appellant's position that this condition had persisted for some months, without correction by the Board. On the day before the meeting appellant had gone to the runway and swept up from part of it a bucketful of the gravel and debris of which he was complaining. It was this bucketful, according to the People, that was dumped upon the table of the President on the day in question.

Appellant's case at the trial was that he only intended to *place* the bucket of gravel and debris on the table in front of the President, right side up, that he did not intend to spill the contents, and that the spilling resulted when the President physically assaulted appellant, causing the bucket to be accidentally and unintentionally overturned.

The foregoing factual résumé is necessary to a consideration of appellant's argument that the letter of January 23, 1968, was hearsay.

The letter of January 23, 1968, written by the F.A.A. to appellant, first acknowledges receipt of two earlier letters from appellant, one dated August 8, 1967,

and the other dated November 10, 1967. In the latter two letters from appellant his complaints about the runway conditions at the Santa Maria Airport are acknowledged in the F.A.A. letter. The F.A.A. letter then goes on to say that following the receipt of each of appellant's earlier letters an inspection of the airport had been made, and that on neither inspection had any hazardous condition been found. The first inspection, on August 10, 1967, according to the F.A.A. letter, did disclose a small amount of loose gravel on the edges of the runway, not enough to amount to anything, and no metal scraps. The second inspection disclosed no loose gravel or metal scraps. Reference is made in the letter to a flight data publication, and the information in that publication to the effect that the runway was unsafe is said to have been knowingly furnished by appellant himself, without verification by the F.A.A. The letter concludes that, in the opinion of the F.A.A., the airport was being properly maintained.

The purpose for which this F.A.A. letter was offered and received in evidence is not clear. Both this letter and the earlier letters from appellant referred to therein, were written after the offense in question. The letter of January 23, 1968, was not, and could not have been, offered to impeach appellant's trial testimony, for he stated at the trial that he had received many letters from many agencies, some of which agreed with him that a dangerous condition existed, some of which disagreed, and some of which expressed no concern. The introduction into evidence of one letter disagreeing with him did not impeach this testimony, not being inconsistent therewith. He at no time testified that the particular F.A.A. letter in question said anything dif-

ferent from what it did say. He in fact testified that he had no recollection of the F.A.A. letter until it was shown to him.

It is apparently respondent's position that the letter of January 23, 1968, in some way demonstrated that the condition of the runway on July 5 and 6, 1967, was safe, and that the safety of the runway on July 5 and 6, 1967, was relevant to the disturbing the peace charge. But the F.A.A. letter has nothing to say about the condition of the runway on July 5 and 6, 1967.

Respondent argues that the January 23, 1968, letter bears upon appellant's state of mind on July 6, 1967, the date of the offense. Perhaps it might have, if appellant had written it. But obviously appellant's state of mind on July 6, 1967, is not evidenced by what some one else wrote on January 23, 1968. It is not that appellant's state of mind at the time of the offense is irrelevant, but that this manner of showing it was not competent.

Respondent's argument that the January 23, 1968, letter was not offered to prove the truth of its contents, and was thus not hearsay, is without merit. The inescapable conclusion is that the letter could only have served to prove that the runway was safe in August and November, 1967, when the inspections were made, and that appellant's complaints to the contrary were false. If the letter didn't prove these things it had no relevance to the lawsuit at all.

The argument that the letter was admissible as a reply to an earlier letter from appellant is not founded on the facts. The Evidence Code (Section 356) provides that "when a letter is read, the answer may be given." No earlier letter was read, nor its substance referred to, except in a most general sort of way.

We conclude that the letter of January 23, 1968, was hearsay, that it fell within none of the exceptions to the hearsay rule, that it should not have been received, and that its reception into evidence over timely objection was error. The question now becomes one of how serious the error was.

The letter in question was made use of for the purpose of proving the truth of what it said. Appellant was never confronted by the writer of the letter, and had no opportunity to cross-examine him. The right of a defendant in a criminal case to be confronted by the witnesses against him is guaranteed by the Sixth Amendment to the United States Constitution; a right now binding on state court tribunals through the 14th Amendment.

Bruton v. United States, 391 U. S. ....
Painter v. Texas, 380 U. S. 400
People v. Johnson, 68 A.C. 674

Appellant was deprived of this constitutional right. Section 1204 of the Evidence Code provides as follows:

> "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

The test for weighing the gravity of a federal constitutional error in a criminal trial is this: Can the reviewing court declare its belief that such error was harmless beyond a reasonable doubt? If it can, even an

error of federal constitutional dimensions requires no automatic reversal. If it cannot, reversal is mandatory.

Chapman v. California, 386 U.S. 18; 17 L. Ed. (2d) 705

People v. Johnson, 68 A. C. 674

The burden of proof is upon the People to prove to the reviewing court that federal constitutional error is harmless beyond a reasonable doubt.

Chapman v. California, supra.

People v. Johnson, supra.

Applying that test, this Court must ask itself whether or not the People in this case have proved beyond a reasonable doubt that the receipt into evidence of the letter in question was harmless. We answer this question in the affirmative.

In the first place, the letter did not relate to the condition of the runway on July 6, 1967. But leaving aside the letter entirely, we are satisfied beyond a reasonable doubt that the result would have been the same. Appellant's own testimony (apart from the letter) demonstrates his guilt. He knew before entering the room that the airport board was in a regularly scheduled session. He had arranged in advance for a court reporter to be present. He knew that his mere presence in the room, without the bucket of gravel, would annoy the board, so bitter had the differences between the board and him become. When he gathered up the gravel and debris the day before, he anticipated even then that reporters would be present and that photographs of the bucket on the desk would be taken. He knew, so he testified, that the President of the board had "not hesitated to engage in acts of violence with people with

whom he disagreed, in spite of age and weight differentials." He testified that his purpose in bringing the bucket of gravel into the room was to dramatize his position, as well as that of others. He knew he could have taken a spectator's seat, put the bucket on the floor, and awaited his turn on the agenda. Instead he strode through the room while the board meeting was in progress, lifted the bucket up over the manager's head in order to place it on the desk in front of the President, sat or tried to set the bucket in front of the President, all with the following intent in mind, as he testified:

> "I intended to draw the condition of the runways to the attention of the community and the public, and the other directors, and the press and the people in the audience, *and if this incidentally would annoy them, then I suppose you might say my conduct intended to annoy them,* but this was not any primary motive by any means." (R. T. p. 195).

It is true that in other portions of his testimony appellant denied an intent to annoy the board, but such testimony is simply incredible, being totally incompatible with what he did. Appellant is, and was then, an attorney. By his own testimony his differences with the board, and theirs with him, had reached such an explosive point that his presence in the room, alone, without more, annoyed them. Add to this the carrying in of the bucket for the avowed purpose of placing it in front of the President while a meeting was in progress, the interruption of the meeting that he knew and hoped this would entail, the picture taking that he anticipated with relish, and the other factors already referred to, and, giving full credence to appellant's own testimony,

no rational conclusion is possible except that he meant and intended to vex or annoy the Board of Directors. This in and of itself constituted a disturbance of the peace.

Penal Code Section 415.

Penal Code Section 7(4).

Whatever additional public spirited motive appellant claims to have had, one of his motives was to annoy the Board. He succeeded. His conduct by his own version of it was so bizarre, rude, and outlandish, and the other evidence of his guilt so overwhelming (leaving aside the F.A.A. letter) that the erroneous receipt of the letter was harmless beyond a reasonable doubt, in our opinion.

There is no merit in appellant's second contention that the prosecution of the charge against him infringed upon his constitutional right of free speech. No speech or speaking was involved. From the time appellant entered the room until he left it he said nothing. Nor can any sensible argument be made that appellant's acts amounted to some sort of symbolic speech, protected by the First Amendment.

Adderly v. Florida, 385 U.S. 39.

U. S. v. O'Brien, 20 L. Ed. (2d) 672.

The last point to be considered has to do with the terms and conditions of probation imposed by the trial court. The wide discretion vested in the court in this connection is recognized, but some of the conditions here imposed appear to be unreasonable, for the reasons hereinafter stated.

The first condition, that appellant "will promptly and sincerely make a public apology to Donald Prentice and

other members of the Airport District Board of Directors, and staff, as they existed on July 6, 1967," is not workable. How is an apology in "public" to be arranged? If it could be arranged, who is to judge whether the apology is "sincerely" made?

Moreover, this being a criminal charge, the offense is against the people of the State of California, not against any private person or persons. No therapeutic benefit to appellant could result from his being required to publicly apologize. Old antagonisms would only be restirred. This term and condition of probation, being impracticable and rehabilitatively hurtful, is stricken.

The requirement that appellant seek psychiatric treatment is one that is felt to have been within the trial court's discretion. Such a term of probation in a criminal case is not unusual, and the only inquiry an appellate court should make as to such a probationary condition is whether or not the evidence in the case, and the demeanor and attitude of the defendant involved, reasonably indicates that such a condition is appropriate, and has some rational relation to the offense. Here the trial court is in a better position to judge than we are, having heard the testimony of the defendant and having observed him throughout. The question is not whether this court would have imposed such a condition in the first place. The question is whether the trial court abused the discretion vested in it in imposing this condition. A consideration of the entire record before us leaves us unwilling to say that there was an abuse of discretion on this score.

Probation condition Number 4 reads as follows:

"Defendant will tender his resignation to the Board of Directors of the Santa Maria Public Airport District,

and the matter of acceptance of such resignation will be up to the discretion of the board. The defendant will seek no other public office during the period of probation, and will refrain from engaging in any publicity seeking activities, including radio and television, and newspapers. The defendant will request a consultation with the Santa Barbara Bar Association, Lompoc-Santa Maria Chapter, to discuss his conduct mentioned in this opinion, with the view that defendant will hereafter comply with all recommendations of the Bar Association designed to insure that defendant conducts his business and affairs in an ethical and professional manner, avoiding violation of the Rules of Professional Conduct of members of the bar."

This term and condition of probation is stricken. We have in mind that appellant was elected to the Airport District Board of Directors by the electors of that district *after* the offense here involved. We can fairly assume from the record that the incident was given extensive newspaper publicity in the district, and that the electors were aware of it. It is not for the courts to overrule the result of this election. Nor is it for the present Board of Directors to be given the right to do so. Appellant stands convicted of a misdemeanor. Such a conviction entails no loss of civil rights and no loss of the right to hold public office. This condition of probation bears no reasonable relation to the offense, and constitutes an unwarranted interference with the electoral process.

The requirement that appellant go to the Lompoc-Santa Maria branch of the County Bar Association is likewise uncommendable. The court is not a legal ethics disciplinary tribunal. Should the court in effect tell ap-

pellant to go to the Bar Association to find out what the bar might want to do about the incident, such a directive would lend itself to a suggestion from the court that the bar should act. Whether the disciplinary committee of the bar should take action in a given case is the bar's business. Not that courts are unconcerned about the ethics of the legal profession—a judge of any court is free to personally ask the bar to investigate and act upon any professional impropriety, as is anyone else. But to require an attorney probationer to initiate such an inquiry himself, as a condition of probation, is to use the probationary power of the court to officially condemn him before the bar in advance. The bar, both state and local, is fully equipped to discipline its own members. It either is aware, or can readily be made aware, of this case, and is free to take such action as it chooses. On this we express no opinion one way or the other.

The judgment is affirmed. The order on probation is affirmed, except as herein modified.

Dated this 17th day of December, 1968.

/s/ John A. Westwick,
John A. Westwick, Judge of the
Appellate Department of the
Superior Court.

We concur: /s/ C. Douglas Smith, Presiding Judge of the Appellate Department of the Superior Court.

/s/ Percy C. Heckendorf, Judge of the Appellate Department of the Superior Court.

APPENDIX C.

Denial of Application for Transfer.

In the Appellate Department of the Superior Court of the State of California in and for the County of Santa Barbara.

The People of the State of California, Plaintiff and Respondent, vs. Ted Bushman, Defendant and Appellant. No. 82816.

Appellant's application for a transfer of this case to the Court of Appeal is denied.

Dated: January 13, 1969.

C. Douglas Smith
C. Douglas Smith, Presiding Judge of the Appellate Department of the Superior Court.

John A. Westwick
John A. Westwick, Judge of the Appellate Department of the Superior Court.

Percy C. Heckendorf
Percy C. Heckendorf, Judge of the Appellate Department of the Superior Court.

APPENDIX D.

Defendant's Instruction No. 8.

When you are considering the evidence in this case that pertains to the conduct of the defendant at the time he is alleged to have disturbed the peace and quiet of Donald M. Prentice and the Board of Directors of the Santa Maria Public Airport District, in your effort to determine whether or not the defendant's conduct was tumultuous and offensive it is essential that you keep these following principles in mind:

The vitality of the civil and political institutions in our society depends on free discussion. It is only through debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly, a function of free speech under our system of government is to invite a disturbance. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Thus, though you may find from the evidence in this case that the peace and quiet of Donald M. Prentice and the Board of Directors of the Santa Maria Public Airport District was disturbed, or may even find that one or more were stirred to anger by the conduct of the de-

fendant, this in of itself, would not warrant you finding the defendant guilty. You must go further and examine the conduct of the defendant and determine whether his conduct was tumultuous and offensive and in addition thereto, whether he performed maliciously.

Terminiello vs. Chicago, 337 U.S 1, 93 L. Ed. 1131.

Given,
Refused, ✓
/s/ AJ
Judge.